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**BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20554**

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

In the Matter of)	FCC 02-201
)	
Amendment of Section 73.202(b),)	MM Docket No. 98-112
Table of Allotments, FM Broadcast Stations)	RM-9027
(Anniston and Ashland, AL, College Park,)	RM-9268
Covington, and Milledgeville, Georgia))	RM-9384

To: The Commission

**REPLY TO RESPONSE TO MOTION FOR LEAVE TO FILE SUPPLEMENT TO
COMPLAINT AND REQUEST FOR INVESTIGATION**

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November 10, 2003

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Preston W. Small (Mr. Small), by his attorney, hereby replies to the opponent's November 6, 2003 *Response to Complaint and Request for Investigation (Response)*. In reply thereto, the following is respectfully submitted:

1) Before proceeding to the substance of the reply, we shall first address the opponent's request at footnote 1 of the *Response* that Mr. Small's November 3, 2003 *Motion for Leave to File Supplement* Mr. Small's October 29, 2003 *Complaint and Request for Investigation* "should be denied." The *Response* is confused about whether the opponents seek "denial" of the *Motion for Leave* on the merits or "dismissal" of the *Motion for Leave* itself on procedural grounds. Should the opponents be seeking dismissal of the *Motion* without Commission consideration of the merits, that request is out of order. The opponents do not argue that the *Complaint and Request for Investigation* is procedurally defective and the opponents conclude that the *Complaint and Request for Investigation* should be "dismissed as groundless." Although the proper phrasing of the opponents' *Request*, ¶ 5, would properly read "denied as groundless," in as much as "groundlessness" is a merits determination, the opponents do not deny that there are factual and legal matters raised in the *Complaint* and in the *Motion* which they must address. In fact, the opponents do address the merits of the *Complaint and Request for Investigation* and the *Motion for Leave*. Because Mr. Lipp and his clients do not argue that the *Complaint and Request for Investigation* is procedurally defective, and because they, in fact, respond substantively to the *Complaint and Request for Investigation*, the question is whether consideration of the *Motion* which was filed only a few days after the *Complaint and Request for Investigation*, because additional information came to light, would serve the public interest in light of Mr. Lipp's and his clients' substantive responses to both the *Complaint and Request to Investigate* and to the *Motion for Leave*.

2) The opponents' proffered justifications for denial of the *Motion* involve such things as Mr. Lipp's denial of knowing anything about the his law firm's PAC, a statement that Mr. Lipp has had

no contact with the Senator, a recitation of the fact that political contributions are matters of public record, and that Mr. Lipp and his clients consider that the allegation that Mr. Lipp and his clients tried to corrupt this proceeding “does not even warrant a response.” *Response*, at 1 n. 1. However, these are merits arguments that do not go to the issue of whether the contents of the *Motion* should be accepted. Merely because the opponents state that they will prevail on the merits of this matter does not justify denial of the *Motion* to seek leave to supplement the record with the very information the opponents deny substantively. The fact that the opponents consider that they will prevail on the merits of the issue does not justify denying the *Motion*. Because the opponents provides no procedural argument or fairness argument for denying the *Motion* to supplement the October 29, 2003 *Complaint and Request for Investigation*, which was filed just several days prior to the *Motion*, and because the opponents have responded substantively to the factual allegations contained in the *Motion*, the *Motion* and the associated information should be made a part of the record of this proceeding.

3) Mr. Small’s *Complaint and Request for Investigation* alleges that given the known factual circumstances it appeared that Mr. Lipp and his clients “improperly solicited the Senator to send the *ex parte* letter. As parties appearing before the Commission, WNNX/Susquehanna/Mr. Lipp are charged with knowing and complying with the Commission’s litigation rules.” *Complaint and Request for Investigation*, ¶ 4. Clearly, the *Complaint and Request for Investigation* is directed against Mr. Lipp and his clients. However, the *Response* provides only a limited denial which states that

I will be brief. I have never had any contact, orally or in writing, with anyone in Senator Shelby’s office. I am not responsible for Senator Shelby’s failure to provide a service list in his letter. I was served with a copy of the letter just as Small acknowledges that he was served with a copy of the letter. Small does not know who was served and who was not served. He is making assumptions, and based on these assumptions he makes accusations and engages in speculations about my motives and intentions.

Response, ¶ 2.

4) Even if the opponents denial of Mr. Lipp's direct contact with the Senator were accepted at face value, a highly dubious assumption given the known facts, the *Response* completely, and pointedly, fails to deny that Mr. Lipp caused others to contact the Senator and fails to deny that Mr. Lipp's clients, WNNX/Susquehanna and his Alabama clients, improperly solicited the Senator. The *Response* utterly fails to discuss how it came to be that six of Mr. Lipp's represented Alabama FM stations came to contact the same congressional representative at the same time concerning the same matter. Given that "we know that FM call signs do not converse with United States Senators and that a human being contacted the Senator," *Complaint and Request for Investigation*, ¶ 8, given Mr. Lipp's unique position which enables him to comment upon his own clients' activities, given the utter failure of the opponents to deny or explain their involvement in the improper solicitation of the Senator, and even if the very narrow denial of direct contact quoted above were accepted at face value, material questions remain regarding how the Senator was brought into this proceeding and the roles played by Mr. Lipp and his clients.

5) The *Response*, ¶ 3, contains an obvious error when it states that the Senator's October 8, 2003 letter was a mere "status request." The General Counsel's Office's October 22, 2003 letter to the Senator concludes that the Senator's letter was an impermissible *ex parte* presentation which discussed the "merits" of the proceeding and which cannot become a part of the decision making record in the proceeding. Moreover, the OGC considered the status portion of the Senator's letter to be inconsequential as evidenced by the fact that the OGC provided the Senator with an estimated decision date even after finding the merits portion of the letter to be problematic.¹ It is the merits

¹ The *Response*, ¶ 3, also incorrectly states that "Small has extended this proceeding for more than 5 years in the hope that he will wear his opponents down." Mr. Small was the first filed rulemaking petition in this proceeding, WNNX filed on top of Mr. Small's. If any party is to bear responsibility for litigation, it resides with WNNX. Moreover, the Commission's first decision in this case was not issued until April 28, 2000, *Report & Order*, 15 FCC Rcd. 9971 (2000), and the *Response* exhibits some faulty counting skills. Finally, as previously discussed, Mr. Small has been
(continued...)

discussion in the Senator's letter which is the problem; the Senator's letter is not merely a status inquiry as the opponents write because, if that were the case, the OGC would not have determined that the letter filed in violation of the *ex parte* rules.

6) The *Response* is also obviously incorrect when it states that "Small does not know who was served and who was not served." The Senator's letter explicitly discloses who was served and clearly neither WNNX/Susquehanna/Mr. Lipp nor the parties in MM Docket 01-104 were served. This failure of service resulted in the OGC determining that the Senator's letter violated the *ex parte* rules.² The *Response* presents no verifiable information that the Senator's letter was lawfully served any person or party other than the single party noted on the Senator's October 8, 2003 letter.

7) Nearly a month after the Senator sent his letter to the Chairman Powell, the *Response*, ¶ 2, now claims that Mr. Lipp "was served with a copy of the letter just as Small" was served, which would have to have been by mail without any advance knowledge of the drafting and mailing of letter. The opponents' claim that Mr. Lipp was served in the same manner that Mr. Small was served is not credible. The *Response* fails to explain why the opponents did not report the letter as required

¹(...continued)

sued for allegedly filing in this proceeding to delay payment of \$10 million from Susquehanna to a third party. Because that allegation has proven false, WNNX now claims that Mr. Small, a small business represented by a sole practitioner, is attempting to wear out multiple, large and small corporations represented by large law firms in a year's long litigation is absurd on its face.

² The *Response* fails even to suggest any reason explaining why the Senator would know of Mr. Small's involvement in MM Docket 98-112 and serve him, but the Senator would somehow fail to note service upon the party which has received tentative FCC approval to operate an FM station in Atlanta. Nor does the *Response* suggest why the Senator would note service upon Mr. Small but, if the *Response*, ¶ 2, is to be believed, the Senator maintains a secret service listing for other parties receiving the letter. Common sense indicates that if the Senator knew about Mr. Small, and the FCC's requirement to serve Mr. Small, that he also knew about WNNX/Susquehanna and the requirement to note service upon them and that if the Senator were acting independently, he would have noted service upon WXXN/Susquehanna/Mr. Lipp.

by, an in apparent violation of, 47 C.F.R. § 1.1214.³ The Senator's letter plainly does not indicate service upon WNNX/Susquehanna, in apparent, and obvious, violation of the *ex parte* rules. Mr. Small immediately notified the FCC of his receipt of the Senator's letter via his October 15, 2003 *Second Request for Prompt Case Processing and Submission of an Ex Parte Letter Received by Counsel*. The decision to notify the Commission upon receipt of the letter was not a complex one—there are only two parties involved in MM Docket 98-112 and the Senator's October 8, 2003 letter showed service on only one of those parties. While there are multiple parties involved in MM Docket 01-104, the Senator's letter still shows service upon only one party and that party Mr. Small and not any of the multiple parties which Mr. Lipp represents.

8) The opponents' claim of receipt of service of the letter in the same manner as Mr. Small is thus contradicted by the facts. First, Mr. Lipp/WNNX/Susquehanna failed to notify the Commission of their receipt of the Senator's October 8, 2003 letter upon receipt of the Senator's letter even though that letter clearly appeared to violate the *ex parte* rules. Second, they failed to notify the Commission of their receipt of the Senator's October 8, 2003 letter in response to Mr. Small's October 15, 2003 *Second Request for Prompt Case Processing and Submission of an Ex Parte Letter Received by Counsel* which pointedly states, at ¶ 2, that Mr. Small was providing a copy of the Senator's letter to Mr. Lipp because the Senator's letter did not indicate service upon Mr. Lipp or his clients. Third, the opponents failed to notify the Commission of their receipt of the Senator's October 8, 2003 letter in response to the OGC's October 22, 2003 letter finding that the Senator's letter violated the *ex parte* rules for failing to serve them. It was only after receiving the November

³ § 1.1214 provides that

Any party to a proceeding or any Commission employee who has substantial reason to believe that any violation of this subpart has been solicited, attempted, or committed shall promptly advise the Office of General Counsel in writing of all the facts and circumstances which are known to him or her.

3, 2003 *Motion for Leave Complaint and Request for Investigation* demonstrating the reeking nature of what transpired did Mr. Lipp and his clients belatedly come forward to claim that they had received service, just as Mr. Small had received service, nearly a month earlier.

9) The *Response*'s unsupported claim of service in the same manner in which Mr. Small received service just does not jibe with the facts. Moreover, given the *Response*'s complete failure to be candid about the facts and circumstances concerning how the Senator became involved in this proceeding, including the direct roles played by Mr. Lipp's clients, and given the opponents' failure to deny Mr. Lipp's indirect involvement with the production of the Senator's letter, the opponents' unsupported claim that everything is hunky-dory cannot be credited.

10) The *Response*, ¶ 3, claims that "there very well may be others waiting to file." That speculation is not only unsupported, it is irrelevant because the only FM stations shown in the record to have improperly contacted the Senator are Mr. Lipp's clients. The contacts with the Senator were not made on behalf of, for example, an association of Alabama broadcasters, the contacts were limited to an unknown person or persons representing the interests solely of Mr. Lipp's clients, a fact which points a finger directly at Mr. Lipp and his clients. Indeed, the face of the Senator's letter states that the letter was written for the benefit of several FM broadcast stations who, it turns out, are represented by Mr. Lipp. The opponents cannot, and do not, disclaim involvement in the improper solicitation because their involvement is clear from the face of the Senator's letter. What is completely missing is any explanation about how the Senator came to be involved in this proceeding, who spoke to the Senator, what was the Senator told, and what was the Senator asked to do.

11) In seeking to raise a material question in a Commission proceeding, Mr. Small is not required to show the existence fire in order to prove that there is a fire. *See Serafyn v. FCC*, 149 F.3d 1213, 1220 (D.C. Cir. 1998). In other words, Mr. Small is not required to submit a signed confession from Mr. Lipp and/or his clients in order to raise a substantial question of fact concerning the

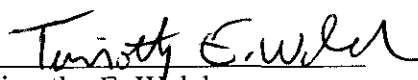
circumstances surrounding the Senator's letter. Mr. Small's obligation under the *Astroline* test, *Astroline Communications Co. v. FCC*, 857 F.2d 1556, 1561 (D.C. Cir. 1988), is to 1) allege facts which if true, and without consideration of any opposing information, show that grant of the application would be *prima facie* inconsistent with the public interest; and 2) if test #1 is satisfied the Commission next determines on the basis of the available information whether a substantial and material question of fact has been raised.

12) The first *Astroline* test is satisfied because Mr. Small's pleadings allege facts which, if true, show that Mr. Lipp and/or his clients improperly solicited the Senator for the purpose of corrupting this proceeding. Solicitation of others to violate the Commission's rules is disqualifying. *Complaint and Request for Investigation*, at 6 n. 7 citing 47 C.F.R. § 1.1210 ("no person shall solicit or encourage others to make any improper presentation under the provisions of this section."); *Motion for Leave to File Supplement to Complaint and Request for Investigation*, ¶ 8; *c.f. Schoenbohm v. FCC*, 204 F.3d 243, (D.C. Cir. 2000). The second *Astroline* test is also satisfied because the facts alleged, and the supporting documentary evidence, raise material and substantial questions of fact because the factual allegations stand un rebutted save for the opponents unsupported, limited, and late filed denial of Mr. Lipp's direct, personal involvement. The *Response* fails to explain Mr. Lipp's indirect involvement in the improper solicitation, even though the issue of Mr. Lipp's indirect involvement was clearly raised. *See e.g., Complaint and Request for Investigation*, ¶ 8 (Mr. Lipp may have coordinated the improper contacts to the Senator). Moreover, the *Response* says nothing about the roles Mr. Lipp's clients played in the improper solicitation, even though Mr. Lipp is in a unique position to provide that information. Furthermore, Mr. Lipp's clients say nothing in their own defense concerning their involvement. Consequently, there exist substantial and material questions of fact concerning: 1) Mr. Lipp's role in the solicitation of the Senator, 2) Mr. Lipp's role in causing the Senator to be solicited, 3) Mr. Lipp's clients' various roles in soliciting the Senator, 4) Mr. Lipp's

clients' various roles in causing the Senator to be solicited, and 5) whether Mr. Lipp and his clients lacked candor in filing their *Response* by failing to discuss the roles which Mr. Lipp's clients played in the solicitation of the Senator. While the *Response*, ¶ 4, baldly asserts that the factual information presented by Mr. Small is "frivolous," the *Response* raises more serious questions that it even comes close to answering and investigation is required to ascertain who solicited the Senator, who caused the Senator to be solicited, what was said to the Senator, what the Senator was being requested to do, and to determine based upon these findings whether the opponents should be disqualified from the captioned proceeding.⁴

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Respectfully submitted,
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⁴ This is not a good factual setting for Mr. Lipp to suggest that the undersigned and Mr. Small should be admonished for filing pleadings before the Commission. *Response*, ¶ 5. In fact, one could scarcely imagine a worse looking appearance than the one which Mr. Small's opponents created by soliciting the Senator's assistance in this restricted proceeding.

CERTIFICATE OF SERVICE

I hereby certify that I have this 10th day of November 2003 served a copy of the foregoing *Reply to Response to Complaint and Request for Investigation* by First-Class United States mail, postage prepaid, upon the following:

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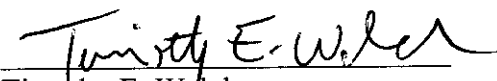
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